IN VACATION.

On May 8, 1902, a banquet was tendered by the Chicago Bar Association to Hon. Francis E. Baker, recently appointed Judge of the United States Circuit Court for the Seventh Circuit. The response of Judge Baker to the toast "The Guest of the Evening" is a model—combining thoughtful comment upon legal topics with polished diction and refined humor. We are indebted to the *Chicago Legal News* for the following reproduction of his remarks:

Mr. President, and Members of the Chicago Bar:

I am very grateful for your kindly expressions and for the gracious manner in which you received me among you. This meeting to-night has been an especial pleasure, but, like all pleasures, it may possibly be followed by a certain amount of compensating pain. It certainly will not be the remorse which, in Mr. Ade's musical comedy, our fellow-citizen, the Sultan of Sulu, after being introduced to the American cocktail, felt "in the cold, gray dawn of the morning after;" but it may possibly be regret for the bright things we might have said if we had only thought of them in the brilliant light of the night before. Whatever the pains, they will be more than offset by the memory of this pleasant meeting with the Chicago Bar Association.

Although this association represents a common law state, I am persuaded that you are no common lawyers. I do not mean to question your qualifications to practice under the system existing here, for, if I did, I might possibly be called upon to answer according to the code; but I intend to convey my impression that the common law may be chief of the causes that have enabled you to take such a leading part in directing the world of affairs and in coloring and flavoring the jurisprudence of our country. In a word, a good common law lawyer is not a common man.

Indiana has no common lawyers. They are all uncommonly good. In proof of this I offer in evidence Attorney General Taylor as exhibit A. The letters of our alphabet and the comprehensible numerals are too few for identification of all of the exhibits and, besides, I am content to rest the case on the one already in.

Indiana has no common lawyers because our way is made plain and easy by a code. In 1852 the tirades of Bentham against the judge-made law, and the efforts of Professor Austin to reduce the law to an exact science, and the labors of Dudley Field in rewriting the law in words of one syllable for the children of men, had come into quite general notice, and Indiana took up with these ideas and adopted a code. The underlying purpose was simple. Rights and duties were to be stated with such clearness and precision that none would err, that none would question, that courts would rarely be called upon to decide more than a dispute of facts, and their way would be made clear in that. The art of pleading was abolished. Law and equity were merged and the complaint and the answer were to consist, as the code itself says, merely of the statement of the facts constituting the cause of action or defense in plain and concise language, without repetition, and in such manner as to enable a person of com-

mon intelligence to know what is intended. Every man is authorized to be his own lawyer and everybody's else who wants him. In brief, the law was made so clear that, as to the people in general, "he who runs may read," and, as to those who aspire to judicial office, he who can read may run.

In the fifty years that have followed the adoption of the code, it is estimated that 20,000 cases have been put into the Indiana reports, covering 100,000 points, and of these more than half are points of practice. For the building of an encyclopedia of pleading and practice I believe that Indiana contributes more material than any other ten States combined, and for ways in which lawyers may fall down and in which courts may throw cases out of the window, Indiana challenges the world.

Now, I have meant none of this otherwise than in praise of the bar of my native State. In such an upgrowth in distinctions and refinements the successful lawyer has had to be a man of diligence, learning, broad vision and acumen. The point of the matter is that, while the common law is confessedly the judge-made law, the code system has been unable to break away from the judge-made law. The legislators have simply furnished some additional raw material for the judges to work on and this is really all that they can do, since the judiciary decide whether the enactments shall stand or fall and declare what they mean, and for this the judges are not to be blamed. Since you have clothed them in gowns it is perfectly natural that they should acquire a disposition to have the last word.

Coming from the bench of a code State to a wider field I have been looking somewhat into law in general. Now, in the scientific discussion of any subject I believe it is recognized that the first essential is to adopt a proper classification. The classification should be rational, consistent within itself, and inclusive of all the known phenomena. I therefore classify all law under two heads, the common and the uncommon. Taking uncommon law to be that which is not common, a statement of what the common law is at the same time defines the uncommon and points out the line of demarcation between the two. Common law is that simple embodiment of the rules of human conduct which is set forth in some seven thousand volumes of decided cases, of about seven hundred pages to the volume.

When we consider that by reading diligently, say fifty pages a day every day in the year, one could go over these five million pages in the brief space of two hundred and seventy-five years, we come at once upon the fountain-head of the reason for that maxim which declares that no one may plead ignorance of the law.

This same consideration led the framers of the Indiana Constitution of 1851 to provide that all persons over twenty-one years of age, who are at large and not under indictment, should be eligible for admission to the bar without examination. Since all men are bound to know the law, it would be an idle ceremony to require an examination to see whether or not they know what they know they know, and what they are bound to know they know.

These figures in regard to the understanding of the common law remind me of nothing else so much as the astronomer and the fixed star. There is this difference, however: When the astronomer has traveled his thousand miles a minute for his thousand million years he expects to land on the star; but the

man who reads his five million pages in his two hundred and seventy-five years to reach the end of the common law will find that fifty million new, unread pages are waiting for him at the supposed goal. If he had all the eyes of Argus to read with, the fixed star would still be the more hopeful thing to chase after. In the domain of our jurisprudence, whatever else may be fixed, the limits of the common law are not.

Now, in this situation of things I deem it best to try to find a law for determining the law at any given time and under any given circumstances. The common law, *lex non scripta*, according to Coke and the other old masters, is the perfection of human reason. What is not reason is not law. *Cesset ratio, cessat lex.* But whose reason, and what is reason, and what is the perfection of human reason, and what the imperfection?

In following through this labyrinth the only string I have been able to tie to is this: Law is that which is most plausibly asserted and strenuously maintained, the trier of causes being the judge of the plausibility and strenuity. In the discarding of worn-out laws, in the excretion of dead matter, this is the law of death. When a proposition ceases to be plausibly asserted and strenuously maintained it ceases to be the law. In the development of new law, in that growth that comes from the law's inherent power, this is the law of life. When a proposition comes to be plausibly asserted and strenuously maintained, it becomes the law.

But if I am mistaken in this I have another argument that is just as conclusive. In the long run and on the average, that which is asserted and maintained by the great majority is what is capable of being asserted most plausibly and maintained most strenuously, and so it comes that, in the main, the common law is a self-adjusting measure of our state and condition, and it drops from view the things we have outgrown and it makes a way for itself among the new conditions of our advancing civilization.

At the same time, this rule accounts for those decisions which are the law, but which, nevertheless, we say are not law. It simply means that in those particular cases the wrong thing was most plausibly asserted and strenuously maintained in the court's opinion. For you will remember that the trier of the cause must be the judge of the plausibility and strenuity. With that the lawyer has nothing to do. A learned brother was advancing a proposition to the court and was handling it with about as much assurance as a woman would a mouse, when the judge interrupted him: "You do not think that is the law, do you, Mr. Brown?" To which Mr. Brown replied, "No, I do not, but I didn't know but what your honor might." The moral of this tale is that despite the fact that our courts have so many times taken the wrong thing to be the law, we may live in hopes that the truth may eventually be so plausibly asserted and strenuously maintained before them that they will finally decide the law to be what the law is.

Now, all the time I have been aware that my skimmer is full of holes. I have been making no progress. What is plausibility? What argument is strenuous? What proposition is plausible? What is reason? What is unreason? What is the perfection of human reason and what the imperfection? There we are, right back at the beginning.

The trouble was that we did not start from the right point; and, instead of

using the ancient Coke, we should have lighted our torch at the altars of those closet philosophers who have no difficulty in reducing the law to an exact science. Their definition is simple and clear. Law is the science of legal rights. It would rightly be taken as heretical to inquire if it is true that "legal" is the adjective of "law," that the term "legal rights" implies laws declaring and assuring rights, and that the definition, "Law is the science of legal rights" may possibly not go beyond saying that law is the science of law.

But, after all, it is just as much exercise to meander around a ring as it is to go ahead in a straight line. And does the law ever go ahead in a straight line? Law is not an exact science. It is a science. We have all admitted this so frequently that we should be estopped from denying it now. Law may be exacting to the lawyer and upon the client, but it is not exact. If it were not for those interesting conditions and delightful uncertainties that arise interminably, what place would there be for courts, and how many members of the bar would have the wherewithal to spread this sumptuous banquet? In the office and in the forum we do not deal with principles of fixed dimensions, but we deal with particular sets of facts. In the well-known facts it is a condition and not a theory that confronts us. Our advice is filled with "ifs" and "buts," and we leave a back door open through which we may go out and lay our failure to the stupidity of the court, for the benefit of the client. On the bench our decisions are so adroitly worded that when the next similar case comes up we can show, if we care to, and not if we do not, forty reasons why the former decisions do not apply to the case in hand.

I remember hearing a former justice of the Supreme Court say that it was a pretty poor stick of a judge who could not write an opinion either way which would read well and be fairly bristling with authorities. I remember hearing one of the greatest lawyers I ever knew, say in his office when a younger brother put a legal question to him, "I do not know. I will have to see which side I am retained on."

There is no puny, wabbly-kneed proposition of unregistered birth that may not step into court and hope to find a father. If counsel for plaintiff cites 1 Euclid, p. 1, to the proposition that a straight line is the shortest distance between two points, counsel for defendant needs not despair. He may not at once find an authority on his side—though I believe that a Callaghan salesman could convince him that he had the book he wanted—but if he did not have an authority to expound he would have so much the more time in which to show that the plaintiff's authorities were not in point. He might concede, for the sake of the argument, that the straight line was the shortest distance; but, is that the most desirable way of getting through? Is it the most practicable? In fact, is it at all feasible? And if there was a lady of proper charms in the case he might well deny the plaintiff's proposition *in toto* and contend that was in the contemplation of the parties that the longest way around was the shortest way home.

Having now demonstrated what the common law is, it only remains to give my understanding of the uncommon law. I can do this best by relating an experience of a friend of mine. In my own county in Indiana there used to be a justice of the peace in whose court this lawyer never lost a case. In the particular case in question my friend appeared for the defendant. The authori-

ties were all squarely against the position he took, but the facts showed that the plaintiff was seeking to take advantage of a harsh legal rule. After hearing the evidence and the arguments of counsel, the squire rendered his decision in this way: I find that the law is with the plaintiff, but I have concluded to throw this case into equity and I therefore decide for the defendant. This country squire elucidated the whole history of equity jurisprudence and expounded the philosophy of the development of law. Uncommon law is law *ex vi termini*. It is law in the process of being born. It lies in the womb of progress. It comes forth as the facts of advancing civilization are accepted, first, by the generality of mankind and then, finally, by the courts.

The rule in Shelley's case is part of the common law of the land, but many of our courts have thrown it into equity, and the uncommon law is now the common. A bank officer by signing his name on a promissory note with the word "cashier" affixed, binds the bank and not himself personally. The urgencies of modern business have made the uncommon law supplant, in this respect, the old common law rule of *descriptio personæ*. The uncommon rights and duties arising from the construction and operation of multiform appliances in which steam or electricity is used, have become and are becoming common law in our day.

Whether or not the use of a right of way a thousand feet above the surface of the earth by Marconi's wireless telegraphy, or Santos-Dumont's transcontinental line of air-ships, will be an appropriation of land, the title to which exists *usque ad cœlum*, is still a problem of the uncommon law.

Without further elaboration I may say that the need of the times is more uncommon law. If a decision is wrong, multiplying it a thousand times will not make it right. If a tower of precedents is like the tower of Pisa, a further adding to it will simply take the center of gravity out of the base and topple it over. And, finally, I may say that if there shall be less fearsomeness in dropping old shells in which there have been no kernels for a hundred years—if there shall be a quicker and readier adaptation of the law to our rapidly advancing civilization, there can be no question but that our system of law, common and uncommon, shall endure

"Till the sun grows cold,
And the stars are old,
And the leaves of the judgment book unfold."